Beyond Bakke—The Use of Noncognitive Factors in Professional School Admissions Decisionmaking

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The professional school admissions decisionmaking process has never been a totally objective exercise. Neither has it been limited to consideration of applicants' intellectual abilities. The advantage of being the offspring of alumni or faculty, for example, has long been recognized. However, as candidate selection has become a process of distributing an increasingly scarce commodity, the consideration of noncognitive characteristics of applicants—those qualities not identifiable as demonstrated intellectual ability—has been subjected to in-


2. The explosion in professional school applications has been well-documented. The number of medical school applications for the 1971-72 entering class was 29,172, while 41,400 were expected to apply for the 1978-79 entering class. ASSOCIATION OF AMERICAN MEDICAL SCHOOL COLLEGES, MEDICAL SCHOOL ADMISSION REQUIREMENTS 1978-79: UNITED STATES AND CANADA 24 (1977) [hereinafter cited as MEDICAL SCHOOL ADMISSION REQUIREMENTS]. During the same period the number of first year medical school seats rose from 12,361 to 16,200. Id. The Law School Admission Test (LSAT) was administered 133,230 times in 1976, almost tripling the 44,905 administrations a decade earlier in 1966. AMERICAN ASSOCIATION OF LAW SCHOOLS & LAW SCHOOL ADMISSION COUNCIL, 77-78 PRELAW HANDBOOK 23 (1977) [hereinafter cited as PRELAW HANDBOOK]. The number of first year law school seats did not quite double in that decade, growing to 39,996 from 24,167. Id.

However, the rise in professional school applications appears to be leveling off. For instance, 1974 was the peak year for LSAT administrations, with 135,397 tests given. A drop occurred in the following two years. Id. Indeed, the Association of American Medical Colleges (AAMC) fears a "precipitous drop" in applicants which might make this supply/demand issue a moot point. Chronicle of Higher Education, March 20, 1978, at 1, col. 3. The expense and length of preparatory and professional education along with publicity of the difficulties of obtaining admission may discourage applicants. Id. Self-selection may also be taking place. "[T]he pattern of application for the past three years suggests that the absolute number of applicants may decline while the comparative qualifications of those applicants remaining may be still stronger than today." PRELAW HANDBOOK, supra at 23.

3. Noncognitive factors are nonintellectual personal traits. They are noncognitive in the sense that they are not the product of a cognitive (thinking) activity by the possessor. They include characterizations of what a person is—tall, thin, Caucasian, female, Oklahoman—and how a person is—motivated, moody, morose, malleable. See notes 37-40 and accompanying text infra.

Cognitive determinants are those numerical indicia which assign a value to an appli-
creasing judicial scrutiny.4 If the number of professional school applicants continues greatly to exceed the number of available positions, cant’s academic or intellectual achievements or potential. They represent an attempt to quantify the nature or extent of each applicant’s intellectual capacities to facilitate ranking.

Every American law and medical school uses some quantified measure of intellectual, or cognitive, ability. The most commonly considered cognitive determinants are grade-point average and standardized scores from nationwide tests such as the Law School Admission Test, PRELAW HANDBOOK, supra note 2, at 29, and Medical College Admissions Test, MEDICAL SCHOOL ADMISSIONS REQUIREMENTS, supra note 2, at 5.

4. The first modern admissions case to generate great publicity was DeFunis v. Odegaard, 82 Wn. 2d 11, 507 P.2d 1169 (1973), vacated as moot, 416 U.S. 312 (1974). Since then, the cases of Alevy v. Downstate Medical Center, 39 N.Y. 2d 326, 348 N.E.2d 537 (1976), and Bakke v. Regents of Univ. of Cal., 18 Cal. 3d 34, 553 P.2d 1132, 132 Cal. Rptr. 680 (1976), aff’d in part & rev’d in part, 98 S. Ct. 2733 (1978), have examined the use of race as a factor in professional school candidate selection. See also Glassman v. New York Medical College, 64 Misc. 2d 466, 315 N.Y.S.2d 1 (Sup. Ct. 1970). In Glassman the court upheld a public medical school’s consideration of the plaintiff’s past mental history, including a voluntary mental commitment and suicide attempts.

Defendants’ rejection of plaintiff does not constitute a denial of due process and the equal protection of the law. So long as rules and standards for admission are fair and reasonable and are applied equally and fairly to all applicants, there is no violation of due process and the equal protection of the law. Id. at 4.

The alleged practice of favoring applicants whose acceptance might attract additional benefits to the school (beyond the intellectual presence and payment of tuition presumably contributed by every student) was challenged in Steinberg v. Chicago Medical School, 41 Ill. App. 3d 804, 354 N.E.2d 586 (1976). In Steinberg, the plaintiff alleged that medical school applicants were being judged on their relationship to faculty members or potential benefactors of the school. The plaintiff argued such consideration was in breach of contractual obligations, created by the school’s acceptance of application fees, to evaluate each candidate solely on the basis of criteria published by the private school in informational material supplied candidates. The Illinois appellate court remanded the case for trial on the merits to determine if the school had actually judged candidates on a basis not included in its published criteria. See also Donnelly v. Suffolk University, 337 N.E.2d 920 (Mass. App. Ct. 1975). In Donnelly, the Massachusetts appellate court upheld the right of defendant private university to consider the recommendations of defendant’s alumni, students, and friends in consideration of law school applicants, consistent with the university’s written statements that “‘the [admissions] committee chooses to evaluate each applicant’s potential . . . by studying all relevant evidence.’” Id. at 921. The court said such consideration did not constitute an “unfair” practice, nor was it “deceptive” in light of the university’s statement. Id.

The analysis of earlier admissions cases, which invalidated racially-exclusive admissions in segregated state professional schools, is inapplicable to the DeFunis-Bakke line of cases. The admissions procedures challenged in the late 1940’s denied applicants admission because they were black, not because the schools were full. Sweat v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948). The demand for professional education did not overwhelm the schools thirty years ago as it does now. Two to three candidates now compete for each professional school seat, see note 2 supra, whereas in the mid-1950’s at least one medical school had only 103 applicants for 150 places. Chronicle of Higher Education, March 20, 1978, at 1, col. 3.
more frequent challenges to the use of noncognitive factors in admissions decisionmaking can be anticipated.

The Supreme Court's decision in *Regents of the University of California v. Bakke* will not decrease the number of admissions suits. Although the Court in *Bakke* held that race could be given "competitive consideration" in a "properly devised admissions program," it did not set out what such a program would entail or allow. By failing to clarify the status of the applicant's rights or the appropriateness of any admissions formula, the Court has left the use of all noncognitive selection factors vulnerable to challenge. After *Bakke*, rejected applicants with superior academic credentials will be on the lookout for questionable noncognitive admissions criteria. The state of Washington's experience supports this prediction. The Washington Supreme Court's approval of race-conscious professional school admissions in *DeFunis v. Odegaard* has not dissuaded candidates from attacking other aspects of the professional school selection process in the Washington state courts. Challenges to the University of Washington School of Medicine's admissions policies have attacked consideration of applicants' gender, residence, relationship to alumni or faculty, and sociological, economic, or political beliefs. If the response to *De-
*Funis* is any indication, *Bakke* will, at most, merely shift the field of battle in professional school admissions.

Admissions committees thus face a dilemma. *Bakke* exposes to increasingly certain challenge those admissions processes, especially prevalent in law schools, that select white candidates solely or largely on the basis of cognitive determinants such as grade-point average (GPA) and standardized scores from nationwide tests (Board Scores), reserving consideration of subjective noncognitive factors\(^1\) to certain nonwhite applicants. Varying selection criteria in this way creates “quotas” of the type struck down in *Bakke*. Considering “motivation” an important quality in blacks but not in whites, for example, discriminates against motivated whites by denying them, *on the basis of race*, consideration with regard to a quality admittedly considered relevant by the admissions committee.\(^2\) Thus, in order to consider the subjective noncognitive characteristics of minority candidates the schools must consider the subjective noncognitive characteristics of all candidates. At the same time, however, the consideration of noncognitive factors, necessary to insure minority student participation in professional school education, has itself been subjected to increasing challenge.

The response of many schools to the admissions dilemma presented by *Bakke* may be, as many minority leaders and educators fear,\(^3\) a retreat to exclusive reliance on GPA and Board Scores. The “fairness” facially apparent in comparison of such quantified indicia admittedly

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1. See note 39 and accompanying text *infra* for a definition of subjective noncognitive factors.

2. The fact of race is wholly determinative in the treatment accorded the candidate, and thus potentially suspect under *Bakke*. If the school thus limits consideration of the motivated whites it would appear to infringe on the applicant’s right to individualized consideration without regard to his race, considered important by Justice Powell in *Bakke*, 98 S. Ct. at 2753.

Professional School Admissions

avoids the specter of unconstitutional racial quotas.\textsuperscript{14} However, it also virtually assures the denial of professional school education opportunities to minorities, who historically have scored lower than whites according to these traditional measures of intellectual ability.\textsuperscript{15}

This comment suggests that professional schools constitutionally need not and, as a matter of policy, should not be deterred from considering at least some noncognitive criteria in admissions decisions. An exhaustive constitutional analysis of the standard of inquiry appropriate for each noncognitive criterion is not attempted. Instead, the comment shows in Part I that, regardless of the standard of scrutiny applied, any constitutional adjudication will involve some inquiry into the relationship between the school's articulated admissions goals and the admissions criteria used to implement them.

The focus of the comment, then, is to analyze those goals that are typically advanced as legitimate by professional schools and to examine how consideration of various noncognitive criteria might help fulfill such goals. The comment in Part II examines the possible goals of a responsible selection process. Part III–A discusses the use of some objective noncognitive admissions criteria—age, gender, and residency—and their relationship to the goals set forth in Part II.\textsuperscript{16} Part III–B focuses on the policy reasons for considering subjective noncognitive admissions criteria. Finally, the comment concludes that con-

\textsuperscript{14} There is no apparent "quota" or "goal" if all candidates are selected for all seats through the same measure. \textit{See} University of California, Berkeley, School of Law, \textit{Report on Special Admissions at Boalt Hall After Bakke}, 28 J. LEG. EDUC. 363, 377–78 (1977) (analysis of the "safeness" of such a plan).

\textsuperscript{15} Linn, \textit{Test Bias and the Prediction of Grades in Law School}, 27 J. LEG. EDUC. 293, 294 (1975); \textit{MEDICAL SCHOOL ADMISSIONS REQUIREMENTS}, \textit{supra} note 2, at 46.

\textsuperscript{16} The failure to articulate goals could have grave consequences if the admissions process were analyzed under a means-oriented equal protection test:

\begin{itemize}
  \item Putting consistent new bite into the old equal protection would mean that the Court would be less willing to supply justifying rationales by exercising its imagination. It would have the Court assess the means in terms of legislative purposes that have a substantial basis in actuality, not merely in conjecture.
\end{itemize}

\textit{Gunther, The Supreme Court 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection}, 86 Harv. L. Rev. 1, 21 (1972). Gunther proposes "that legislative means must substantially further legislative ends" in order for a classification to be constitutional, and suggests that newer equal protection decisions of the Supreme Court eschew most judicial value judgments about state ends. \textit{id.} at 20.

Even if no equal protection challenge can be sustained, the school can not rationally formulate an admissions policy without some articulation of the goals of the selection process and the relationship of admissions criteria to them. See Gellhorn & Hornby, \textit{supra} note 1, emphasizing the professional school's duty to articulate admissions goals and standards, and notes 77–85 and accompanying text \textit{infra}, discussing inappropriate "hidden agendas" in the selection process.
sideration of some noncognitive criteria, although exposing admissions programs to court challenges, is an important way of assuring that professional schools fulfill their obligations to their respective professions and to society.

I. CONSTITUTIONAL STANDARD APPLIED

_Bakke_ focused on the equal protection requirement that admissions criteria be related to legitimate admissions goals such as educational and professional diversity and rectification of past discrimination.\(^{17}\) The Court did not, however, specify the standard it would employ in scrutinizing that relationship in nonracial classifications.\(^{18}\) Analysis of equal protection challenges involves a judicial evaluation of the importance of the affected governmental and individual interests. Even though such noncognitive criteria as sex, age, and residency have not been found to support the exacting “suspect class” standard of inquiry, under the emerging flexible approach to equal protection analysis, the Court may be expected to require that professional schools show at least some type of relationship between their articulated admissions goals and the selection criteria they employ.\(^{19}\)

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17. 98 S. Ct. at 2757 (Powell, J.).
18. See note 19 infra for an analysis of the standards four justices might use in reviewing nonracial classifications.

Indeed, four justices have explicitly acknowledged the "new" equal protection analysis. Justice Powell's first articulation of this new analysis, in a concurring opinion, expressed some reluctance at its arrival. Craig v. Boren, 429 U.S. 190, 210-11, n.* (1976). But in _Bakke_ his characterization of the effect of candidate classification on the individual (nonadmission to the state professional school) as a "denial of the relevant benefit—'meaningful participation in the educational program,'" had an obvious impact on his decision. 98 S. Ct. at 2756. Justice Brennan's _Bakke_ opinion, which was joined by Justice Marshall, analyzed admissions decisionmaking by applying the traditional strict scrutiny standard to racial classification. However, it reserved the question of the standard applicable in other, nonracial admissions classifications, and both of those justices have engaged in equal protection analysis that goes beyond the traditional tests. Justice Marshall has long advocated use of a "spectrum of standards" varying with the "constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1972) (Marshall, J., dissenting). Justice Brennan has stated that "it is clear that we employ not just one, or two,
Therefore, more useful than a traditional analysis is one which recognizes the impact of governmental actions on individual interests at a flexible level more exacting than that imposed by the rational basis test but not as strict as that entailed by either strict scrutiny or the calcifying "intermediate scrutiny" given gender classifications. Although actions embodying academic principles have historically been considered relatively immune from scrutiny by the courts, professional school usually represents the exclusive route to the rejected applicant's chosen profession. This factor, coupled with the relative


Justice Stevens also did not reach the constitutional question presented in Bakke, and thus did not set out the applicable equal protection standard. However, he has recently suggested that equal protection analysis reflects a consistent judicial attempt to afford justice on a case-by-case basis, and therefore he refrains from endorsing a set formula, stating that "a careful explanation of the reasons motivating particular decisions may contribute more to an identification of [the Court's standard] than an attempt to articulate it in all-encompassing terms.” Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring).

20. Judges have hesitated to strenuously review academic decisionmaking for fear of the chilling effect judicial interference might have on scholastic freedom, Board of Curators v. Horowitz, 435 U.S. 78, 90–91 (1978); Epperson v. Arkansas, 393 U.S. 97, 104 (1968), and because of a self-professed judicial ignorance of academic matters:

"It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (citation omitted).

Judicial deference has been especially great in the case of medical schools. “[I]n matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student. . . . Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine.” Connelly v. University of Vt. & State Agricultural College, 244 F. Supp. 156, 160–61 (D. Vt. 1965) (upholding medical student's academic dismissal if not arbitrary, capricious, or in bad faith). See also Wong v. University of Cal., 15 Cal. App. 3d 826, 93 Cal. Rptr. 502 (1971) (upholding medical student's academic dismissal if not arbitrary, capricious, or in bad faith).

21. See notes 32-34 and accompanying text infra. Arguably, the rights affected by the applicant's rejection are only economic because nonadmission will interfere with his desire to enter a lucrative profession or force him to attend a private or out-of-state school with higher tuition rates. See text accompanying notes 57-67 infra. Classifications with economic impacts have historically been analyzed through the rational basis test. Dandrige v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical, 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

Closely related, in this instance, is the state's broad power to regulate and limit the persons allowed to practice in any number of professions. See, e.g., Williamson v. Lee Optical, 348 U.S. 83 (1955) (ophthalmological services); Barsky v. Board of Regents, 347
scarcity of the professional school education, may justify judicial inquiry greater than that afforded by the traditional rational basis test.\textsuperscript{22}

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  \item The right to regulate access to a profession is never delegated to the state professional school, except, arguably, in West Virginia, Mississippi, and Wisconsin, which extend the "diploma" privilege to state law school graduates, allowing them to become members of the bar without further examination. RULES FOR ADMISSION TO THE BAR 44, 81, 83 (West 1975). See Shenfield v. Prather, 387 F. Supp. 676 (N.D. Miss. 1974) (rejecting challenge to Mississippi's diploma privilege). The question of regulation, however, is necessarily considered in any contemporary discussion of professional education because it is impossible in most states to enter a profession without some formal instruction. See notes 32-33 and accompanying text \textit{supra}.

  \item The importance of professional school education to the person seeking admission would never, alone, subject the entire candidate evaluation process to strict scrutiny. The right to education has not been considered fundamental since the Supreme Court's decision in Rodriguez v. San Antonio Ind. School Dist., 411 U.S. 1, 35 (1973). Professional school education is obviously not necessarily "to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." 411 U.S. at 37. However, the result of candidate classification, nonadmission to the state professional school, is arguably "denial of the relevant benefit—meaningful participation in the educational program," which had some impact on the \textit{Bakke} decision. Bakke, 98 S. Ct. at 2756 (Powell, J.). \textit{Rodriguez} did not involve a total bar to educational facilities at any given level, as nonadmission to professional school may. The court in \textit{Rodriguez} specifically reserved the question of the "fundamentality" of a right were a classification to occasion "an absolute denial of educational opportunities." 411 U.S. at 37. The bar to state facilities might prompt stricter judicial review when coupled with the educational exclusivity of professional employment, since nonadmission also may preclude employment in the person's chosen field. See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) ("[T]he right of the individual to contract, to engage in any of the common occupations of life . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men" are generally considered substantial rights. Although found in a due process case, the same principles were applied by the Court in \textit{In re Griffiths}, 413 U.S. 717 (1973), which struck down a rule prohibiting aliens from becoming members of a state bar.

  \item It has been suggested that use of "traditional" rational basis analysis virtually assuages that the state classification will be upheld. Redish, \textit{Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments}, 22 U.C.L.A. L. REV. 343 (1974):

    When applying this test, the Court has generally strained to find any conceivable basis to justify a legislative classification, whether or not the legislature actually considered that purpose. It is, therefore, not surprising that the number of reversals of state action under this standard was traditionally infinitesimal.

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\textit{ld.} at 351-52 (citation omitted). This laxity is not true, however, of the newer types of equal protection analyses, discussed in note 19 \textit{supra}, even though they may analyze classifications under the nominal "rational basis" test. As Justice White noted in his dissent in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1972), the state should be required to actually demonstrate that the challenged classification is rationally re-
II. LEGITIMATE GOALS FOR ADMISSIONS POLICIES

Although the goals have been articulated in many different ways, the types of interests served in the admissions process can be generally classified as academic, meritocratic, or professional.

A. Academic Goals

Academic needs are fulfilled by selecting students who can perform the required tasks and who will stimulate classmates and professors and attain added intellectual prestige for the school. Such students are academically attractive for at least two reasons. Academicians place an intrinsic value on intellectually rewarding learning situations. Bright students and alumni also create “good press” for the school, making it easier to get and retain facilities, funding, faculties, and more bright students to perpetuate academic excellence. Obtaining “educational benefits that flow from an ethnically diverse student body,” expressed as a goal of the Davis medical school by Justice Powell in *Bakke*, represents a third type of academic goal, that of diversity.

B. Meritocratic Goals

Meritocratic principles prompt professional schools to provide educational opportunities to those applicants who seem most deserving.

21. The Equal Protection Clause permits discriminations between classes but requires that the classification bear some rational relationship to a permissible object sought to be attained by the statute. . . .

22. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, *without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement*, makes equal protection analysis no more than an empty gesture.

23. The original purpose of standardized tests, which were developed when most applicants were admitted to professional schools, was to weed out approximately the bottom 20 percent who were intellectually incapable of performing academically in professional school. Erdmann, *Separating Wheat from Chaff: Revision of the MCAT*, 47 J. MED. EDUC. 747, 748 (1972).


25. *Id.* at 2757.

26. “The atmosphere of ‘speculation, experiment, and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.” *Id.* at 2760.
The meritocracy principle is widespread in allocation of benefits, as noted by Professor Michael Shapiro:

[What in fact counts as merit, at least in most Western cultures... includes] ability and aptitudes of various sorts, both intellectual and "physical"; good works and accomplishments generally; effort or "trying"; industriousness; endurance, courage; physical strength and beauty. . . . All of these attributes . . . are frequently used as criteria for deciding who shall receive the rewards and riches of life.  

Definition of merit will often draw the battle lines in admissions criteria disputes. For instance, the plaintiff in Bakke asserted that it was wrong to deny him admission to medical school while "reserving" places in the entering class for members of minority groups because Bakke performed better in traditional cognitive predictors of medical school success—thus was more "deserving" of medical training—than many of the students admitted under the challenged program. Conversely, defenders of race-conscious admissions traditionally have argued that all applicants who perform beyond a certain minimal level of quantitative competence are equally qualified for professional school, and that because the supply of education is limited, the schools are justified in allotting seats to minorities because past discrimination "deserves" compensation. In Bakke, such race-oriented meritocracy is reflected in the school's effort to "counter the effects of societal discrimination."


The allotment argument is weakened by the practice in some schools of seriously considering minority candidates who fall below the minimal quantitative levels required for applicants not considered under a special admissions program. Such was the case in the challenged programs at both the University of Washington School of Law and the University of California, Davis. School of Medicine, Bakke, 18 Cal. 3d 34, 43, 553 P.2d 1152, 1158, 132 Cal. Rptr. 680, 686 (1976); DeFunis, 83 Wn. 2d at 17–18. 507 P.2d at 1174.

30. 98 S. Ct. at 2757 (Powell, J.).
C. Professional Goals

Finally, a school seeks to fulfill a commitment to the profession and to the public by admitting those candidates who will best serve the public in a professional capacity. One of the distinguishing characteristics of a professional school is that it usually represents the exclusive route to the student's chosen career.\(^3\) Except for five states in which it is still possible to become a lawyer solely by clerking,\(^3\) every

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31. Although law and medical school admissions schemes are the primary consideration of this comment, its reasoning could be applied to veterinary, dentistry, social work, and architecture graduate programs to the extent of a court's characterization of the school's responsibility for practical professional competence and an applicant's inability to gain access to the field without specialized institutional training. See notes 32–34 and accompanying text infra.

Application of the comment's reasoning to training programs for public professions such as fire fighting or law enforcement is doubtful. Training academies differ from professional schools in their lesser emphasis on academic achievement as a means of candidate selection and the greater importance of the academy applicant's quantifiable physical characteristics. See, e.g., Comment, Height Standards in Police Employment and the Question of Sex Discrimination, 47 S. CAL. L. REV. 585, 608–09 (1974).

The comment is generally limited to the admissions decisions of state professional schools for two reasons. First, guarantees under the fourteenth amendment do not extend to private institutions. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172–73 (1972); Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3 (1883). Cf. Cannon v. University of Chicago, 406 F. Supp. 1257 (N.D. Ill. 1976) (dismissing private medical school applicant's complaint because the school's receipt of federal financial assistance, regulation by federal and state legislature, and role in assisting medical school graduates in securing employment did not make its activities those of the state nor subject it to scrutiny as an “employment agency”).

Second, even if the private school's admissions decisions could be construed as public action because of the state and national accreditation process which law and medical schools undergo, or because of its role in providing access to government-regulated employment, the private professional school does not have the implicit state sanction of a professional school established and funded by the legislature. See Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 177 (1971) (state liquor licensing scheme not enough, standing alone, to make licensed private club's racially discriminatory practices state action, and thus subject to equal protection clause.) See also Cannon v. University of Chicago, 406 F. Supp. 1257 (N.D. Ill. 1976):

[N]either the receipt of state or federal financial aid assistance, nor the existence of a detailed scheme of state regulation, will be sufficient to bring defendants' actions within the purview of 42 U.S.C. § 1983 [Civil Rights Act of 1964] in the absence of a showing that the state significantly participated in the decision to deny plaintiff admission to the medical school.

Id. at 1257.

32. The five states in which a person can become a lawyer solely by clerking are California (four years of law office study), Mississippi (two years of law office study), Vermont (four years of law office study), Virginia (three years of law office study), and Washington (four years of law office study as a registered law clerk). RULES FOR ADMISSION TO THE BAR, 10, 44, 74, 76, & 79 (West 1975). See also, Lewin, The Unhappy Booker, STUDENT LAWYER, Sept. 1978, at 20 (regarding the unpopularity this method of becoming a lawyer has with other bar associations).
new doctor and lawyer in this country must have been accepted by, and usually graduated from, a professional school before he or she can be certified.\textsuperscript{33} The professional school's role was expressed by an amicus curiae in \textit{DeFunis v. Odegaard}: "A school of law is not solely a graduate school in law. It is a professional school responsible for training students who wish to enter the legal profession."\textsuperscript{34}

In \textit{Bakke}, Justice Powell rejected as "facially invalid" a race-conscious professional purpose of "reducing the historic deficit of traditionally disfavored minorities in . . . the medical profession,"\textsuperscript{35} echoing Justice Douglas' statement in his \textit{DeFunis} dissent that "[t]he purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans."\textsuperscript{36}

\section*{III. THE RELATIONSHIP OF NONCOGNITIVE FACTORS TO LEGITIMATE ADMISSIONS GOALS}

This section will examine some of the noncognitive factors a professional school might consider in pursuit of the goals outlined above. All such criteria are either objective or subjective in nature and can be distinguished by the ways in which they are manifested by the candidate and identified by the school. Objective noncognitive factors can be defined in terms of a status.\textsuperscript{37} Once established, they exist indepen-

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\item \textsuperscript{33} \textit{American Medical Association, Physician Distribution & Licensure in the U.S., 1975} (1977); \textit{Rules for Admission to the Bar} (West 1975).
\item \textsuperscript{34} Brief of Deans of Antioch School of Law as Amici Curiae at 5, \textit{DeFunis v. Odegaard}, 416 U.S. 312 (1974). The unique responsibility of the professional school to produce doctors or lawyers, and not just persons knowledgeable in medicine or law, makes it important that the school select applicants with the attributes necessary to become professionals, and not just those with the necessary intellectual apparatus. \textit{See generally Part III-B infra.}
\item The schools acknowledge this duty. For instance, the American Association of Law Schools lists its purpose as "the improvement of the legal profession through legal education." \textit{American Association of Law Schools, Association Information}, Feb. 1978, at 1. The Association of American Medical Colleges has as its purpose "the advancement of medical education and the Nation's health. In pursuing this purpose, the Association works with many [entities and individuals] interested in strengthening the quality of medical education at all levels, the search for biomedical knowledge, and the application of these tools to provide effective health care." \textit{Association of American Medical Colleges, 1977-78 AAMC Directory of American Medical Education} 6 (1977).
\item \textsuperscript{35} 98 S. Ct. at 2757.
\item \textsuperscript{36} 416 U.S. at 342.
\item \textsuperscript{37} Status is the "capacities and incapacities which determine a person to a given
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dent of any judgment by the professional school admissions committee. Subjective noncognitive factors, on the other hand, are based on the admissions committee's subjective perception of the applicant. They include qualities which must be inferred from the applicant's activities and which cannot be directly tested. The effectiveness of each type of noncognitive factor in advancing legitimate admissions goals will be examined independently.

A. Objective Noncognitive Factors

1. Gender

Giving women applicants different consideration than that given men may be justified on academic, meritocratic, and professional grounds. The goals furthered by gender-conscious admissions decisions are similar to those served by race-conscious selections.

38. Objective noncognitive factors include race, gender, age, and residency. Contrast with subjective noncognitive factors, discussed in Part III-B infra. The professional school need not "decide" a candidate's sex, age, or race. Most objective noncognitive factors are established by self-identification, i.e., the applicant indicates the pertinent status in completing the professional school application.

Race will not be examined in this comment. The use of race in admissions decisions has been thoroughly analyzed elsewhere. See, e.g., O'Neill, supra note 1; Redish, supra note 22.

39. They are subjective in the sense of being colored by the experiences and philosophies of members of the admissions committee, who must look for the desired subjective noncognitive factors. This "bias" raises the most common reason given for not considering subjective noncognitive factors. See, e.g., Gough, Nonintellectual Factors in the Selection and Evaluation of Medical Students, 42 J. MED. EDUC. 642 (1967). But see text accompanying notes 84-85 infra (regarding the "bias" inherent in overuse of cognitive determinants in admissions decisions).

40. The activities can be either those in the past which the candidate reports in the admissions process or the candidate's behavior in admissions-oriented activities such as writing statements or interviewing. Thus, they differ from cognitive determinants which purport to express intellectual ability in a quantified sense. See note 3 supra.

41. See text accompanying notes 42-46 infra. For a similar analysis of purposes served by race-conscious admissions, see DeFunis, 82 Wn. 2d at 34-37, 507 P.2d at 1182-85; Redish, supra note 22, at 375-94.

Gender-based admissions classifications are used less frequently than racial classifications. As the use of cognitive determinants has increased in admissions decisions, women have been able to demonstrate parity with men in quantifiable measures of intelligence. Dubé & Johnson, Study of U.S. Medical School Applicants, 50 J. MED. EDUC. 1015, 1022-26 (1975) (acceptance percentage for women higher than men); Cowell & Swineford, Law School Admissions Test—Comparison of Test Analysis Data for White
demically, the presence of women in the school provides a different student perception of a male-dominated profession. Gender-conscious employment practices make it more likely that women graduates will attain significant positions in their respective professions, which will in turn bring prestige to the school. The historical limitation of professional education opportunities for women and a social climate which discourages women from taking advantage of existing opportunities raise meritocratic arguments; the female applicant

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Male Candidates with White Female Candidates, in LAW SCHOOL ADMISSION COUNCIL. ANNUAL COUNCIL REPORT 379, 379–80 (1972) ("scores show the women to be a ... [verbally] superior and more homogeneous group than the men"). This has led most professional schools to ignore gender in the selection process. PRELAW HANDBOOK, supra note 2; MEDICAL SCHOOL ADMISSION REQUIREMENTS, supra note 2. However, although the number of women enrolled in professional schools has doubled in medicine and tripled in law since 1969, less than a quarter of present professional student bodies is female.


42. This type of justification was expressed by two medical education researchers: The educational process from medical school through residency training reinforces the values of aggressiveness, impersonality, and distance. These qualities are related to the complaints most frequently directed against physicians. In a society which links masculinity with these traits and femininity with empathy, kindness, and intuitiveness, it might be helpful in improving the image and the life of the doctor to include more women in the profession. None of these traits are intrinsically masculine or feminine but are human qualities. Since, in our culture, men are given less permission to be emotionally expressive, contact and work with women whose acculturation allows them to express emotion might enable men to have the freedom of acknowledging and expressing affects.


43. Employers may prefer female over male graduates of the same caliber in order to fulfill formal or informal "quotas." But 45 C.F.R. § 80.3(b)(6) (1977), although offering administrative support for preferential hiring of minorities, does not include women in this category. The lack of employment opportunities for persons of one sex in a particular field is precluded as a justification of discrimination against members of that gender in education programs in 45 C.F.R. § 86.7 (1977).

44. See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873): [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.


45. Two authors note:

Our community socialization systems, which include friends, family, counselors, and physicians, may act directly and indirectly throughout the lives of women and minorities to provide [passive discouragement from considering medicine as a career]. It has a negative effect, whether or not this is intended.

who demonstrates intellectual ability comparable to a male candidate is arguably more deserving both because her gender warrants retribution for past wrongs and because she personally has overcome more psychic barriers in rising to her present level of achievement. Finally, candidates of one sex may be thought more likely to possess subjective noncognitive factors, such as empathy or aggressiveness, considered important to professional competence.46

The Supreme Court has often found classifications based on stereotypical notions of gender-based behavior to be unconstitutional.47 The most recent decisions of the Court in this area employ an intermediate standard of review under which gender classification must have a substantial relation to an important governmental objective.48 Although gender classification arguably has a “substantial relation” to academic and meritocratic goals, whether such affirmative action goals for women are “important governmental objectives” is unclear after Bakke.49 Conversely, the professional purposes of pre-
dicting competence may be an "important governmental objective," but gender classification has no "substantial relation" to that goal.\textsuperscript{50}

Regardless of their constitutionality, gender classifications seem an extremely clumsy means of creating diversity in the classroom, rewarding those candidates who have overcome adversity, or insuring the presence of "feminine" or "masculine" qualities in the profession. Any qualities important to these professional school admissions goals can be best identified directly, and not through perpetuating gross gender-based generalities.

2. \textit{Age}

The policy, particularly prevalent in medical schools, of favoring younger candidates makes age important in many professional school admissions decisions.\textsuperscript{51} Consideration of age arguably serves both ac-

\textsuperscript{50} As noted in text accompanying notes 47 & 48 supra, professional competence would be better served by seeking out the desired traits rather than assuming they are gender-based. Thus gender classification is less desirable. Administrative convenience alone would be insufficient to justify competency-based gender classification. Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972).

\textsuperscript{51} At least 28 medical schools specifically consider the age of applicants in candidate selection. U.S. COMM'N ON CIVIL RIGHTS, THE AGE DISCRIMINATION STUDY 76 (1977). In addition, older applicants are implicitly discouraged from applying to medical school:

\begin{quote}
 Except in very unusual circumstances, medicine is not recommended as a second career. . . . Individuals who would be 28 years old or older by the time of matriculation in medical school are urged to consider these data carefully before continuing premedical preparation or plans for application to medical school.
\end{quote}

\textbf{Medical School Admissions Requirements, supra note 2, at 14.}

Although the University of California, Davis, admissions information states "[n]o age limitations have been specified," \textit{id.} at 85, Allan Bakke's rejection from medical school was probably more a result of his age than his race. Only 18.2\% of medical school applicants 32 to 37 were admitted in 1975–76 as compared with 42.3\% of those applying at the age of 21 to 23. More dramatic is the contrast between the 8.1\% of those 38 or over and 56.5\% of those 20 or under at the time of application who gained seats in medical schools. \textit{id.} at 15.

Research shows no overt age discrimination in law school admissions.
ademic and professional goals. Youth is thought to be desirable in providing the stamina necessary for the academic rigors of professional education and in insuring a long professional life, especially for the graduated physician. Ostensibly, the heavy public subsidy of professional education is best spent on those who can return many years of career service.

A recent Supreme Court decision analyzing the constitutionality of state age classifications approved a mandatory retirement age because of its rational relationship to the state's professional purpose. The Court upheld the forced retirement of a state trooper in Massachusetts Board of Retirement v. Murgia because of the state's right to seek "to protect the public by assuring physical preparedness of its uniformed police." Rejection from professional school obviously differs from forced retirement. However, in professional school age classifications, a presumptive finding of future unfitness is made 30 or 40 years before the predicted event. Use of such age classifications for professional and academic purpose might be inappropriate, particularly if physicians develop a more accurate means of forecasting physical and mental health in their potential colleagues. Indeed, preferring a 22-year-old with an extensive history of tobacco and alcohol use over a 30-year-old long distance runner would border on irrationality today with our present knowledge of life expectancies.

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52. Age serves at least two different functions in admissions decisionmaking. It can aid interpretation of a quantified indicator such as GPA or Board Score used to insure minimal academic competence, or it can be used for professional, public service reasons.

In the first use, age and the candidate's consequently earlier academic career are less classification criteria than factors affecting the validity of cognitive determinants. The recent phenomenon of grade inflation may lead some professional schools to consider the time when a candidate's grades were earned, thus discounting the importance of the lower GPA of an older applicant who was in college when the median grade was a C rather than a B. The older rejected candidates may demand age classification with regard to the this purpose while challenging its use for the second goal.

Favoring younger candidates is the type of classification considered in the text accompanying notes 85–89 infra.

53. MEDICAL SCHOOL ADMISSIONS REQUIREMENTS, supra note 2, at 14.
55. Id. at 314.

The possibility of more accurate prediction of life expectancy raises a question of the propriety of using genetic data in allocating professional school resources. Professional goals could probably not support eugenic candidate selection, particularly if the life-shortening trait was ethnically selective. Tension between the school's meritocratic and professional goals would appear to be at its greatest in such a situation, when "merit" is not considered an inherent trait. See generally Shapiro, supra note 27.
3. Residency

A professional school's consideration of applicants' residency can result in a challenge to the selection process. Many professional schools have quotas for state residents while others do not consider residency at all. Ignoring residency can be justified on academic di-

57. The school's failure to consider residency was one of the main thrusts of the plaintiff's original pleadings in DeFunis. Complaint, DeFunis v. Odegaard, No. 741727 (King County Super. Ct., Oct. 18, 1971), reprinted in 1 DeFunis versus Odegaard and the University of Washington 12-18 (Ginger ed. 1974). The argument was the principal basis for Justice Hale's dissent in the Washington Supreme Court. DeFunis, 82 Wn. 2d at 50-51, 507 P.2d at 1192.

Residency differs from the objective factors examined thus far in that a determination of residency will involve at least a minimal subjective deduction by the professional school. The status is generally the result of a judgment based on criteria developed by some state educational entity. Since the characterization of an applicant as a nonresident often means automatic rejection, see note 62 and accompanying text infra, due process may require some sort of hearing. The Supreme Court has struck down the irrebuttable presumption of nonresidency for tuition purposes, Vlandis v. Kline, 412 U.S. 441 (1973). The Court's analysis has been challenged as creating the opportunity for arbitrary substantive judgments about the constitutionality of any classification. See, e.g., Comment, Irrebuttable Presumptions: An Illusory Analysis, 27 Stan. L. Rev. 449 (1975); Sewell, Conclusive and/or Substantive Due Process of Law, 27 Okla. L. Rev. 151 (1974). In addition, its applicability to other governmental activities has been severely limited by Weinberger v. Salfi, 422 U.S. 749 (1975) ("irrebuttable presumption" of nondependency for purposes of denial of social security benefits upheld). Nevertheless, the precedential value of Vlandis in the limited residency admission area would make it difficult to justify a statutory residency determination scheme that did not allow the candidate "the opportunity to present evidence showing that he is a bona fide resident" when residency was the sole criterion for classification. Vlandis, 412 U.S. at 452. Vlandis was distinguished in Weinberger v. Salfi, 422 U.S. 749 (1975).

In any case, it is clear the administrative convenience of a mechanistic residency formula need not be sacrificed. The state can set up any criteria rationally related to the goal of determining residency once that goal is deemed appropriate. Mathews v. Eldridge, 424 U.S. 319 (1976) (upholding social security disability formula). But the school should be prepared to justify the nonresidency classification on the basis of candidate-identified characteristics. See Rabin, Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement, 44 U. Chi. L. Rev. 60, 84-87 (1976) (developing argument for requiring reasons when expected status is changed or denied through governmental action). For instance, a medical school candidate, relying on his supposed resident status when applying to the state professional school, would be entitled to an explanation of the action which denied him residency consideration and, consequently, admission. See generally Medical School Admission Requirements, supra note 2, at 10.

58. Almost half of the 63 state law schools and all state medical schools prefer state resident candidates. In some schools, a certain number of seats are expressly reserved for candidates of certain states or regions. Prelaw Handbook, supra note 2; Medical School Admission Requirements, supra note 2. In addition, two regional plans, established by interstate compacts, set aside places in the medical schools of the University of Washington and the University of Vermont for students from neighboring states with no medical school facilities. Id. at 13-14.

The practice of preferring medical school candidates from rural or inner-city back-
versity, meritorious, and professional grounds. Preferring state residents may advance certain meritorious and professional goals, but it clearly diminishes academic diversity.

The classification question is more clearly presented by challenges to the practice of many state law schools and all state medical schools of preferring state residents. The schools' purposes are defended as being attuned to the states' interests in professional competence; the role of a state school as a provider of doctors or lawyers for the state is emphasized and the economic contribution of resident applicants and their families is seen as a meritorious attribute deserving special consideration.

A state's right to afford residents preferential tuition has been repeatedly upheld as rationally related to the legitimate state interest in providing educational facilities primarily for its citizens. However, grounds, see Dubé & Johnson, supra note 41, at 1028, reflects professional distributive concerns similar to those addressed by state- and region-biased plans. The goals set forth in the text accompanying this note are analogous to the goals of geography-conscious candidate selection, which is usually concerned with providing professionals for specific geographic or economic areas.

59. See, e.g., MEDICAL SCHOOL ADMISSIONS REQUIREMENTS, supra note 2, at 10.
60. Justice Hale, dissenting in DeFunis, stated:

The major resources of a state university school of law founded, maintained and operated by the people of this state and deriving most of its subsistence from their taxes and good will, designed to enable them and their children to obtain a professional education which a substantial number of them could not afford were they studying in private school . . . should be devoted . . . to the people of the commonwealth who founded and perpetually have supported it.

82 Wn. 2d at 50–51, 507 P.2d at 1192.

A few states have also attempted to limit out-of-state student enrollment throughout their higher education systems. See generally L. Glenn & T. Dalglish, PUBLIC UNIVERSITIES, STATE AGENCIES, AND THE LAW: CONSTITUTIONAL AUTONOMY IN DECLINE 70 (1973). The 15% quota on nonresident admissions at the University of North Carolina at Chapel Hill was upheld in Rosenstock v. Board of Governors, 423 F. Supp. 1321, (M.D.N.C. 1976):

Judging the classification under the rational basis test, the Court believes the State has shown reasonable grounds for the differentiation between in-state and out-of-state applicants. The University . . . is a state institution of higher education created for the citizens of the State. Of equal importance is the fact that the University is continuously and substantially supported by the citizens of the State . . . .

Id. at 1326.
the residency tuition cases were brought by nonresidents who were not precluded from attending state schools, albeit at higher cost. Medical schools which do not consider out-of-state applicants at all\(^\text{62}\) discriminate against nonresidents to a much greater degree, and courts might consider admissions challenges more seriously than tuition challenges, particularly when the nationwide practice of preferring residents creates a disparate number of professional school seats for citizens of different states.\(^\text{63}\)

Conversely, the state professional school may choose to ignore state residency.\(^\text{64}\) The state law school having or seeking a "national" reputation typically desires geographic diversity in its student body to attract well-qualified students and professors and to provide fresh viewpoints for its resident students.\(^\text{65}\) It will follow meritocratic principles in selecting students regardless of the geographic accident of residence. The school will argue that professional competence requires choosing the most promising applicants, and state residence has nothing to do with protecting the caliber of the profession on a nationwide basis.\(^\text{66}\)

62. MEDICAL SCHOOL ADMISSION REQUIREMENTS, supra note 2, at 14.

63. In 1975, over 50% of medical school applicants from Wyoming, North Dakota, and South Dakota gained admission. In the same year, less than 30% of those candidates for medical education from California, Alaska, Utah, and Arizona were accepted. Dubé & Johnson, Study of U.S. Medical School Applicants, 1974–75, 51 J. MED. EDUC. 877, 886 (1976).

Of particular importance in residency cases is the right to travel, which has been declared "basic" by the Supreme Court. See, e.g., Doe v. Bolton, 410 U.S. 179 (1973) (striking down residency requirement for medical treatment); Dunn v. Blumstein, 405 U.S. 330 (1972) (striking down durational residency requirements for voters); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down one-year residency requirement for welfare benefits absent a compelling state interest). Of course, the rejected professional school applicant is still free to move from state to state, even if not as a medical or law student. Nonadmission does not deprive an individual of subsistence or the right to vote.

64. Over half of state law schools do not give preference to state residents. PRELAW HANDBOOK, supra note 2.

65. "National" or "regional" professional schools have reputations extending beyond their state borders. "National" law schools often offer instruction which is not geared to the peculiarities of the state in which the school is located. The academic urge to quantify leads to numerous ranking devices to assess the relative reputations of professional schools. See, e.g., Chronicle of Higher Education, March 20, 1978, at 12, col. 1 (rankings of medical schools); JURIS DOCTOR, Dec. 1976, at 17 (rankings of law schools).

66. Harder to justify is preference for minority nonresident candidates in an effort to increase the pool of qualified minorities when the applications of white nonresidents are not considered. This creates a race-based classification of the type discussed in text accompanying note 12 supra, in which relevant criteria are considered for one race but not for another. Justice Hale's dissent to DeFunis rested on his perception of similar consideration of candidates at the University of Washington law school. 82 Wn. 2d at 47, 507 P.2d at 1189. Whether preferential consideration of nonresidents absent a pro-
Residence-blind admissions are related to the interests of a law school with a national perspective, but the legitimacy of that goal and its effect on the applicant can be attacked on policy grounds. The harm to the rejected candidate is twofold: First, the economic rights of the applicant are affected when she is not given preferential access to the state school because she (or, more often, the candidate's parents) is a state taxpayer and monetarily supports the school. Second, the harm to the rejected applicant is aggravated if favorable consideration is given resident applicants by public law schools in other states. The student cannot gain admission to his state school because admission standards are not lower for residents, but is precluded from attending another state's law school.

B. Subjective Noncognitive Factors

Subjective noncognitive factors serve a wide spectrum of admissions goals. The great variety of the factors precludes individual analysis, but a few of the most sought after characteristics are "good moral character," "motivation," and "empathy." These characteristics are important in professional goal such as increasing minority representation would be invalid is uncertain. Clearly, preference for less quantifiably qualified nonresidents based solely on goals of "national" reputation or classroom diversity would be harder to justify. Besides presenting an affront to state goals of insuring professional competence and rewarding tax-based merit, see note 60 and accompanying text supra, such a policy would arguably be irrational with regard to the purported academic goal since less qualified candidates would presumably bring less prestige to the school regardless of their geographic backgrounds. But see note 90 infra (questioning the relationship of academic ability to the type of competence that might bring prestige to the school).

67. This argument was the basis for joining Marco DeFunis' wife and parents as plaintiffs in DeFunis, 82 Wn. 2d at 13, 507 P.2d at 1171. Their standing to join was questioned in Pollak, DeFunis Non Est Disputandum, 75 COLUM. L. REV. 495, 495 n.2 (1975).

68. The requirement of "good moral character" reflects professional concerns; it is often defined negatively in terms of a lack of contact with the criminal law or other punishing entities of the state. See PRELAW HANDBOOK, supra note 2, at 26. Some law schools claim they do not consider such indicia of "character" but warn that prospective applicants might have trouble meeting bar requirements. Id. In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), the Court placed constitutional limitations on "character" requirements: "Mere unorthodoxy [in the field of political and social ideas] does not as a matter of fair and logical inference negative "good moral character."" Id. at 244 (citation omitted). See also Konigsberg v. State Bar, 353 U.S. 252, 262–63 (1957).

69. Motivation is thought to ensure completion of arduous training and a spirited professional career. In addition, motivation is an integral part of any puritan notion of merit. Shapiro, supra note 27, at 322.

70. Empathy has become extremely important in medical school admissions. The necessity of caring in health profession training and practice, and the superiority of can-
teristics reflect the general tenor of subjective considerations; they concern the candidate's attitude about himself, the profession, and those served by the profession. Generally, classification by subjective noncognitive characteristics serves academic goals by injecting diversity into the professional school community and by directing selection of those most likely to succeed in school. To all but the most recalcitrant cognitive snob, nonintellectual personal traits have some bearing on a person's merit. Long hours, ethical decisions bearing


In the practice of law, studies indicate that client satisfaction depends more on interpersonal relationships with their lawyers than on hard-nosed battle techniques. D. Rosenthal, Lawyer and Client: Who's in Charge? 51 (1974). To the extent the lawyer must provide advice and counseling, her role would appear to require the social effectiveness needed by doctors in their counseling of patients.

71. This is often exemplified by "good moral character." Maturity may reflect a similar attitude about the person's worth and purpose in life. Medical students with fewer personal problems tend to perform more satisfactorily in academic work. Golden, Marchionne. & Silver, Fifty Medical Students: A Comparison with "Normals," 42 J. Med. Educ. 146, 152 (1967).

72. Motivation shows a desire to enter the profession, thus reflecting the candidate's attitudes about his or her chosen field.

73. Empathy is important because it predicts a capacity to relate with patients or clients in a professional setting. See note 70 supra. In addition, the applicant's perception of a professional's duty to provide medical or legal services to indigents or to rural areas would possibly be relevant to this concern.

74. Motivation may "cancel out" the effect of lesser intellectual ability manifested in poor cognitive determinants. Although this theory has been repeatedly raised by advocates of race-conscious admission, research has not demonstrated an underprediction of culturally deprived students' grades by LSAT scores. Schraeder & Pitcher, The Interpretation of Law School Admission Test Scores for Culturally Deprived Candidates: An Extension of the 1966 Study Based on Five Additional Law Schools, in Law School Admission Council, Annual Council Report 432 (1972); Linn, supra note 15, at 320. Such a result would, of course, be expected, since the skills required on the LSAT are so similar to those tested in law school. See note 90 infra.

More generally, subjective noncognitive factors have been seen as a way of insuring difference in an intellectually homogenous group. See Erdmann, supra note 23, at 748. In Sweatt v. Painter, 339 U.S. 629 (1950), Texas' segregated law school system was struck down because "a substantial and significant segment of society" was excluded from the black student body, thus precluding racial diversity in the school. Id. at 634. See also Brief of the President and Fellows of Harvard College as Amicus Curiae at 25, DeFunis v. Odegaard, 416 U.S. 312 (1974) ("[T]he Fourteenth Amendment generally permits an institution to make an applicant's probable contribution to the diversity of the student body the primary standard of selection once there is promise of satisfactory academic performance."); Griswold, Some Observations on the DeFunis Case, 75 Colum. L. Rev. 512, 518 (1975).

75. A kindhearted, socially aware, personable genius presumably has more merit as a human being than a selfish, myopic, obnoxious genius. Cf. Gough, Nonintellectual
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on other persons' lives, and a sense of social commitment are hall-
marks of the "professions." Thus, the occupations to which the de-
sired training leads reveal the importance of some nonacademic fac-
tors to professional competence.

There arises here the problem of a "hidden agenda," goals which
actually direct decisionmaking but which admissions committee mem-
bers do not acknowledge to others (or, sometimes, even to them-
selves). Less legitimate goals in the state school admissions process
might include (1) support for political or economic philosophies, for
example, corporate capitalism in the law school or nonsocialized
medicine in the medical school, or (2) a desire to keep the profes-
sional school serene by weeding out potential academic troublemak-
ers.

This desire for academic serenity is reflected in a recent study of
law students by Professors Paul Carrington and James Conley. After
presenting data indicating that one out of every seven law students at
the University of Michigan is "alienated," they suggest:

One potential solution would involve the utilization of the admissions
process. It is at least possible that the major sources of alienation are
the psychological characteristics students bring with them to law
school. If such factors could be identified prior to admission, the
school could reject applicants who were likely candidates for alien-
ation.

The professors acknowledge the difficulty of spotting potential alien-

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Factors in the Selection and Evaluation of Medical Students, 42 J. MED. EDUC. 642, 649
(1967); Korman, Stubblefield, & Martin, Patterns of Success in Medical School and
Their Correlates, 43 J. MED. EDUC. 405 (1968) (achievement- and grade-oriented, aloof
individuals with poor peer esteem and few humanistic qualities usually possessed high
cognitive determinants).

76. See note 121 and accompanying text infra. That is, a profession is not a wholly
academic pursuit requiring only intellect. Consalus, The Law School Admission Test

77. See Brief for Petitioner, McDonald v. Hogness, No. 817562 (King County Su-
a rejected medical school applicant, claimed his first amendment rights were abridged
by the University of Washington medical school's admissions process, which puts heavy
emphasis on the candidates' performance in admissions interviews. McDonald alleged
his politically-based disapproval of socialized medicine, a view that was brought out in
his admissions interview, was one of the reasons for his rejection. He further contended
that any unfavorable decision by the medical school on the basis of that political opinion
improperly limited his fundamental rights to free speech. Regarding a potential justifi-
cation for consideration of such beliefs, see note 73 supra.

78. Carrington & Conley, The Alienation of Law Students, 75 Mich. L. Rev. 887,
ated law students, but the truly disturbing aspect of their advocated admissions criteria, and criteria such as example (2) above, is the inappropriateness of injecting extraneous personal views about the school itself into the selection process with little justification beyond the difficulties "troubled" students create in the classroom.

Such goals would not, at any rate, appear to be valid. The Supreme Court has expressly forbidden political decisionmaking, such as that suggested by example (1), with regard to bar admission. The deliberate exclusion or overrepresentation of candidates with a particular type of personality or with particular religious, moral, or political beliefs could not serve the academic, meritocratic, or professional goals discussed above. Therefore, gross abuse of admissions decision-making power will be subject to some review.

However, an admissions selection process inevitably reflects school officials' backgrounds and beliefs. This may be the price of allowing some exercise of discretion. Indeed, even the quantitatively oriented admissions standards used in most professional schools are no less geared to faculties' personal biases. Admissions committees are usually made up of professors, who are generally academically oriented. When evaluating candidates, they can be expected to emphasize those quantifiable characteristics in which they excel. This academic bias

79. Id.

80. Professors Carrington and Conley seem inordinately concerned that the presence of alienated students "lessens the faculty's enjoyment of teaching." Id. at 892. The article contains no suggestion that the students' alienation might be a justified reaction to professors, classmates, or the school itself.


82. The Court has stated:

[E]ven though a person has no "right" to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.

... Such interference with constitutional rights is impermissible.

Perry v. Sindermann, 408 U.S. 593, 597 (1972). Thus, criteria based on political or religious beliefs would interfere with the applicant's first amendment rights. Goals served by such criteria could not be considered appropriate under any analysis.

83. See Gellhorn & Hornby, supra note 1, at 1006. The authors assert that special consideration of applicants with special political or monetary ties cannot "withstand constitutional scrutiny, no matter how lenient the form of judicial review... [T]he classification they represent is based upon politics and privilege and is unrelated to any legitimate, legislatively sanctioned objective of public higher education." Id.
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may not, however, reflect the needs or desires of the profession. The academic professional is an exotic creature among his or her more practice-oriented colleagues. Thus, the professor placing great reliance on Board Scores or GPA is arguably choosing candidates "in his own image" as vigorously and perhaps as unjustifiably as the radical lawyer who wants every law student to become an urban guerrilla. Professors Thomas Shaffer and Robert Redmount, in a study of law students, noted:

Faculty . . . regard legal education as a technical enterprise. They were opposed to any significant emphasis . . . on human relations skills in law school. . . . Why are faculty opposed to broader, deeper legal education? . . . [L]aw teachers, like most of the rest of us, promote what they do best. . . . [L]aw teachers have been rewarded for their intellectual skills. . . . It is perhaps understandable that this is the success that they seek for their students.85

The medical profession has moved beyond this attitude and has undertaken to prove the relationship between subjective noncognitive factors and professional competence. Studies reflect a growing awareness of the importance of noncognitive factors in competent medical care. It has been suggested that many illnesses "cure" themselves. If this is so, the physician's personal effect may be more important in most cases than any biotechnical wizardry she may command.86

No such relationship between subjective noncognitive factors and professional competence has been proven with respect to the legal profession. But neither has the relationship of cognitive determinants to legal—or medical—competence been proven.87 The courts have in the past relied on common sense in acknowledging the necessity that some personal traits accompany the intellectual acumen that law students and lawyers bring to their daily tasks:

[A]ll the interests of man that are comprised under the constitutional guarantees given to "life, liberty and property" are in the professional

84. See note 90 infra.
87. See note 90 infra.
keeping of lawyers . . . . From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observances of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character." 88

The law school's answer also lies in current events. Lawyers have not shown their share of moral fiber in the political world they so thoroughly dominate. 89 Considering the immense social power wielded by their products, law schools may effectively argue for the consideration of nonacademic, nonquantifiable traits among their cognitively qualified candidates.

In addition, studies must be undertaken to determine the relevant characteristics of professional competence and its relationship to subjective noncognitive factors. Although the lack of statistical support need not invalidate use of subjective noncognitive factors in professional school admissions, only this type of data can satisfy the number-conscious plaintiff of the Bakke and DeFunis genre.

The relationship of intellectual ability to professional competence in either law or medicine has not been proven. 90 Indeed, any sugges-

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89. Although the specter of Watergate is fast becoming hoary from being trotted out at the merest whiff of legal amorality, it still serves as the most striking recent example of ethical bankruptcy within a profession. See generally, Symposium, Legal Ethics and Professionalism, 12 SAN DIEGO L. REV. 245 (1974); Convocation, Legal Profession, 23 DE PAUL L. REV. 633 (1974).
90. In fact, a slight negative correlation between GPA and MCAT scores and clinical competence has been demonstrated. The same study of medical students showed significant correlation between clinical competence and maturity, rapport, and motivation as perceived by predmission interviewers. Murden, Galloway, Reid, & Colwill, Academic and Personal Characteristics as Predictors of Clinical Success in Medical School, in ASSOCIATION OF AMERICAN MEDICAL COLLEGES, PROCEEDINGS—SIXTEENTH ANNUAL CONFERENCE ON RESEARCH IN MEDICAL EDUCATION 181 (1977).

Arguments over the validity of cognitive admissions schemes, exacerbated by burgeoning applicant pools, see note 2 supra, prompted the Law School Admission Council, American Association of Law Schools, National Conference of Bar Examiners, and American Bar Foundation to sponsor a long-term study to determine what lawyers do and how to predict who can perform those tasks most effectively. Carlson, Frederiksen, Baird, Evans, Reilly, Werts, & Winterbottom, Becoming a Competent Lawyer, in LAW SCHOOL ADMISSION COUNCIL, ANNUAL COUNCIL REPORT 631 (1974). The first phase in the
tion of such a relationship is usually discouraged.\textsuperscript{91} Even though the applicant's rights are such that the professional school is left free to consider—or not consider—whatever subjective noncognitive factors it deems most appropriate and most efficiently identified,\textsuperscript{92} the study established a relationship between cognitive determinants, law school grades, and bar examination performance. Carlson & Werts, \textit{Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results} in \textit{Law School Admission Council, Reports of LSAC-Sponsored Research} 211 (1977).

Such a result would be expected, however. The LSAT, law school tests, and bar examinations are all quantified measures which are and have been easily correlated. For example, LSAT testing items are continually matched to law school performance to increase the test's validity. Cross-validation among these indices does not prove their relationship to professional competence, however, for this factor has not been considered in tests thus far. Rosen, \textit{Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria}, 1970 \textit{Tol. L. Rev.} 321, 333.

\textsuperscript{91} See, e.g., Erdmann, Mattson, Hutton, & Wallace, \textit{The Medical College Admission Test: Past, Present, Future}, 46 J. Med. Educ. 937, 942 (1971). These authors explain the statistical phenomena that make correlation difficult when an entire tested group is near one end (in professional school admission, the high end) of a bell-shaped curve such as that created by graphing Board Scores. "To the extent that the use of any selection device increases the uniformity of the admitted group, the power of the device to predict variations in subsequent performance is diminished." \textit{Id.}


Selection procedures may fail to identify students with those characteristics which might be prerequisites for successful physician performance. Instead, such procedures may identify only those who are most likely to achieve success in a current education program. Consequently, many students selected, often on the basis of [MCAT] scores, . . . lack those characteristics that may ultimately determine adequate performance, for example, professional integrity, concern for people, and the ability to relate and communicate interest in the concerns of the community served by the physician.

\textit{Id.} at 314.

Medical school administrators have long doubted demonstrated academic ability as a useful predictor of professional competence, and have attempted to develop other, more satisfactory selectors. The gauntlet was laid down by one author:

With the consistent improvement in the academic qualifications of the applicant pool, the [MCAT] may be used to provide discriminations for which it was not intended. It also means that the accepted pool may become more and more homogeneous with respect to a very limited set of characteristics which may not be the ones which society is seeking for the delivery of primary medical care . . . .

Erdmann, \textit{supra} note 23, at 728.

\textsuperscript{92} One of the strongest arguments for exclusively cognitive decisionmaking is its administrative efficiency. \textit{See, e.g., Brief for the Association of American Law Schools as Amicus Curiae at 16–17, DeFunis v. Odegaard, 316 U.S. 312 (1974) (arguing that}
school's role in staffing a professional care system creates a moral, if not a constitutional, duty to train individuals best suited to professional practice. The "by-the-numbers" admissions committee may have a hard time justifying its professionally inadequate selection system to the noncognitively superior candidates and to the public and profession served by the persons thus selected and trained.

IV. CONCLUSION

"Among the qualified, how does one choose?" As Justice Blackmun noted, that question remains for professional schools even after the Supreme Court's decision in Bakke. In any constitutional challenge to the consideration of noncognitive factors in professional school admissions, the school will be called upon to demonstrate the relationship between these criteria and valid admissions goals. This comment has examined the goals of professional schools and the ways in which some noncognitive factors serve those goals. The number of

primarily cognitive consideration of all applicants but minorities is justified by the large number of professional school candidates.

DeFunis' response to efficiency-oriented admissions for whites is telling when analyzed in light of the University of Washington's argument that noncognitive factors serve professional interests:

If there is something wrong with the system of credentializing, then it should be changed for everyone. The mere fact that DeFunis was White should not subject him to more stringent criteria for entry to the law school than he would have if he were Black.

Petitioner's Reply Brief at 5, DeFunis v. Odegaard, 416 U.S. 312 (1974) (emphasis in original). The brief makes the mistake of equating quantified intellectualism with merit and "higher" standards of admission, see note 29 supra, but to the extent a Bakke or DeFunis argues he was better qualified because of some relevant noncognitive trait that administrative shortcuts caused the professional school to ignore, his argument would have moral force. See Justice Douglas' dissent to DeFunis, 416 U.S. at 331-41. See also text accompanying note 17 supra and note 93 infra.

93. The importance of selecting students with desirable personality characteristics is heightened by research indicating that neither law nor medical students' moral belief systems are changed significantly by professional school training. See Rezler, Attitude Changes During Medical School: A Review of the Literature, 49 J. MED. EDUC. 1023 (1974); Shaffer & Redmount, supra note 85, at 95, 116-17; Thielens, The Influence of the Law School Experience on the Professional Ethics of Law Students, 21 J. LEGAL EDUC. 587 (1969).


95. That is, it is not geared toward ensuring professional competence. See notes 21, 31 & 32 supra (discussion of the state professional school's role in fulfilling this goal).

96. Bakke, 98 S. Ct. at 2808 (Blackmun, J., concurring in part, dissenting in part).
quantifiably qualified candidates continues to exceed the capacity of professional schools to provide instructional opportunities. Bakke challenges the schools either to take seriously the responsibility of selecting the best qualified students and respond with well-planned, well-executed admissions plans reflecting professional needs, or to take easily available data and create simplistic formulas for perpetuating an intellectual aristocracy.97 Too many law schools have already taken the latter route. It is hoped that this comment has demonstrated that the benefits gained from a broad admissions policy which entails consideration of some noncognitive factors outweigh the burdens of predictable constitutional challenges to such a program.

Catherine Wright Smith

97. As one author notes:
There is thus created the possibility that a new kind of aristocratic class could emerge—... not based on birth or wealth but... being composed of those blessed with the demonstrable intelligence and a much better than average general education.... But in their new found riches, schools may have momentarily lost sight of the fact that law is a public profession which needs men and women who can and are willing to deal with the more mundane aspects of the profession.

Consalus, supra note 76, at 509. A similar fear was expressed in the form of a prophecy in the question-and-answer period following the presentation of one research study in 1964:
In the next three or four years we are going to have a steady increase in the number of applicants, and the general tendency of admissions officers in the medical schools will be to put increasing emphasis on test scores and grades. There is a very real possibility, therefore that the cut-off levels at which people will be admitted to medical schools, both on the basis of MCAT scores and college grades, will be rising progressively.

It is important to question whether a dependence on this one type of criterion is going to keep out of medical education a type of student who would become an important member of the medical profession. ... Research on the definition of criteria other than grade averages and test scores which might be used for admission to medical school is an urgent matter.
Price, Taylor, Richards, & Jacobsen, supra note 86, at 211.